A **CHERIAN KC GEORGE & ANOR**

**v.**

**PP**

B COURT OF APPEAL, PUTRAJAYA
RAUS SHARIF PCA
HISHAMUDIN MOHD YUNUS JCA
ANANTHAM KASINATHER JCA
[CRIMINAL APPEAL NO: W-09-69-2011]
C 24 FEBRUARY 2012

***CRIMINAL PROCEDURE:*** *Forfeiture - Dangerous drugs - Forfeiture of property under Dangerous Drugs (Forfeiture of Property) Act 1988 - Presumption of illegal property - Whether rebutted - Dangerous Drugs* D *(Forfeiture of Property) Act 1988, s. 35*

***CRIMINAL PROCEDURE:*** *Forfeiture - Dangerous Drugs - Forfeiture of property under Dangerous Drugs (Forfeiture of Property) Act 1988 - Whether s. 35 applied to claim under s. 32 of the Act - Dangerous Drugs* E *(Forfeiture of Property) Act 1988, ss. 32, 35*

***WORDS AND PHRASES:*** *"the presumption as to liable person and illegal property" - Dangerous Drugs (Forfeiture of Property) Act 1988, s. 35 - Whether applicable to proceeding under s. 32 - Whether words "any proceedings" in s. 35 covers all proceedings under the Act*

F

The first appellant was arrested under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 and was subsequently detained under s. 6(1) of the same Act. An investigation carried out by the police led to the seizure of certain G properties belonging to the first and second appellants. The appellants applied for the release of the properties pursuant to s. 32(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). In the Sessions Court, all the properties were ordered to be forfeited. Upon appeal to the High Court, part of H the properties seized were allowed to be returned and part of it were forfeited on the grounds that the appellants had failed to rebut the presumption under s. 35 of the Act, *ie*, that the properties were illegally acquired. Hence this appeal by the appellants for the release of the balance properties seized. It was I the appellants' contention that the correct test was as stated in s. 32 of the Act *ie*, that the properties were legally acquired and

there was no offence committed. The appellants contended that the High Court judge was wrong in law when he applied the presumption under s. 35 of the Act. The Court of Appeal therefore had to decide on the question of whether "the presumption as to liable person and illegal property" under s. 35 of the Act is applicable to a proceeding under s. 32 of the Act.

**Held (dismissing the appeal; affirming High Court order)**
**Per Raus Sharif PCA delivering the judgment of the court:**

**(1)** The presumption under s. 35 of the Act is applicable to a proceeding under s. 32 of the Act. The wordings in s. 35 are very clear wherein it uses the words "any proceedings" which must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s. 32(3) of the Act is not a proceeding that is envisaged under s. 35 of the Act would not be in tandem with the intention of the law makers and would be in violation to the clear wordings of s. 35 of the Act. (para 21)

**(2)** Based on the facts, the appellants had failed to prove that the properties were not illegal as required by s. 35 of the Act. The presumption thus remained unrebutted and the properties were presumed to be illegal and therefore it had been rightly forfeited to the Government of Malaysia. (para 22)

***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu pertama ditangkap di bawah s. 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 dan kemudian ditahan di bawah s. 6(1) Akta yang sama. Siasatan dilakukan oleh polis menjurus kepada rampasan barangan tertentu kepunyaan perayu-perayu pertama dan kedua. Perayu-perayu memohon bagi pelepasan barangan tersebut menurut s. 32(2) Akta Dadah Berbahaya (Perlucuthakan Harta) 1988 ('Akta'). Di Mahkamah Sesyen, kesemua barangan tersebut diperintahkan untuk dilucuthakkan. Atas rayuan ke Mahkamah Tinggi, sebahagian barangan yang dirampas dibenarkan untuk dikembalikan dan sebahagian daripadanya dilucuthak atas alasan bahawa perayu-perayu gagal mematahkan anggapan di bawah s. 35 Akta, iaitu bahawa barangan-barangan tersebut diperoleh secara haram. Maka rayuan ini oleh perayu-perayu bagi pelepasan barangan yang dirampas. Perayu-perayu menghujah bahawa ujian yang betul

adalah seperti yang dinyatakan di dalam s. 32 Akta iaitu bahawa barangan tersebut diperoleh secara sah dan tidak ada kesalahan yang dilakukan. Perayu-perayu menghujah bahawa hakim Mahkamah Tinggi terkhilaf dari segi undang-undang apabila beliau menggunakan anggapan s. 35 Akta. Mahkamah oleh itu, perlu memutuskan persoalan sama ada "the presumption as to liable person and illegal property" di bawah s. 35 Akta beraplikasi kepada prosiding di bawah s. 32 Akta.

**Diputuskan (menolak rayuan; mengesahkan perintah Mahkamah Tinggi)**
**Oleh Raus Sharif PMR menyampaikan penghakiman mahkamah:**

**(1)** Anggapan di bawah s. 35 Akta adalah beraplikasi kepada prosiding di bawah s. 32 Akta tersebut. Perkataan-perkataan dalam s. 35 adalah amat jelas di mana ia menggunakan perkataan-perkataan "any proceedings" yang mesti diberikan maksud biasanya bahawa ia meliputi kesemua prosiding di bawah Akta tersebut. Untuk mengatakan bahawa sesuatu prosiding di bawah s. 32(3) Akta bukan prosiding yang dibayangkan di bawah s. 35 Akta akan menjadikannya tidak seiring dengan niat pembuat undang-undang dan akan bercanggah dengan perkataan-perkataan jelas s. 35 Akta.

**(2)** Berdasarkan kepada fakta, perayu-perayu telah gagal membuktikan bahawa barangan tersebut sah seperti yang diperlukan oleh s. 35 Akta. Anggapan tersebut kekal tidak dipatahkan dan barangan tersebut dianggap tidak sah dan dengan itu telah dilucuthak dengan betul kepada Kerajaan Malaysia.

**Case(s) referred to:**
*Hong Leong Bank Bhd v. PP [2009] 8 CLJ 463 HC* ***(not foll)***
*Kii Sie Hoong v. PP [2008] 1 CLJ 683 HC* ***(foll)***
*Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC* ***(refd)***
*PP v. Jessie Tan Poh Yoke [2008] MLJU 910* ***(foll)***
*PP v. Lee Kee Seng & Satu Lagi [2005] 3 CLJ 649 HC* ***(foll)***
*PP v. Tan Lee Kok [1998] 2 CLJ 286 CA* ***(foll)***
*Public Finance Bhd v. PP [1999] 8 CLJ 485 HC* ***(foll)***

**Legislation referred to:**
Dangerous Drugs (Forfeiture of Property) Act 1988, ss. 25(1), 32(2), (3), 35
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3(1), 6(1)

*For the appellants - Tina Ong; M/s Sivanantham*
*For the respondent - Asmah Musa; DPP*

*[Appeal from High Court, Kuala Lumpur; Criminal Appeal No: 42-51-2010]*

*Reported by S Barathi*

## JUDGMENT

**Raus Sharif PCA:**

### Introduction

**[1]** This is an appeal by the appellants against the decision of the High Court in affirming the forfeiture of certain properties by the Sessions Court under s. 32 of Dangerous Drugs (Forfeiture of Property) Act 1988 (the Act). The properties were seized by the police pursuant to s. 25(1) of the Act.

**[2]** We heard the appeal on 22 September 2011. After hearing the parties, we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

### Facts

**[3]** Briefly, the facts leading to this appeal are as follows. The 1st appellant was arrested under s. 3(1) of Dangerous Drugs (Special Preventive Measures) Act 1985 and subsequently detained under s. 6(1) of the same Act. An investigation carried out by the police led to the seizure of certain properties belonging to the 1st appellant as well as the 2nd appellant.

**[4]** On 17 September 2007 and on 25 September 2007, the 2nd appellant and 1st appellant respectively applied for the release of the properties seized by the police. The applications were made in pursuant to s. 32(2) of the Act.

**[5]** By a letter dated 7 November 2007, the deputy public prosecutor referred the claims to the Sessions Court for its decision pursuant to s. 32(2) of the Act. The 1st appellant claimed the followings:

(i) Cash amounting to RM423,654;

(ii) One gold necklace, one gold bracelet and one gold ring;

(iii) Two units of laptop; and

(iv) RM221,256.06 in his saving account with Maybank.

**[6]** The 2nd appellant on his part claimed for the release of money amounting to RM104,272.60 kept in the CIMB Account No. 0506-0155257-52-8.

**[7]** On 5 April 2010, after hearing all the parties, the Sessions Court judge forfeited all the properties. Dissatisfied with the decision, the appellants appealed to the High Court.

**[8]** The learned High Court judge allowed the appeal in part. The jewelries and personal belongings of the 1st appellant were ordered to be returned to him. However, the cash amounting to RM423,654 and the money kept by 1st appellant with Maybank as well as money kept by the 2nd appellant with CIMB were ordered to be forfeited.

**[9]** The learned High Court judge held that the statutory presumption under s. 35 of the Act places the burden on the appellants to prove that the properties were legally acquired and they had failed to do so. The High Court was of the view that the presumption under s. 35 is applicable to s. 32(3) of the Act.

**Submissions**

**[10]** The main issue argued before us was whether the presumption under s. 35 of the Act is applicable to under s. 32(2) of the Act.

**[11]** Learned counsel for the appellants submitted that the learned High Court judge was wrong in law when he applied the presumption under s. 35 of the Act that the properties is presumed to be illegal. He contended that the correct test is as stated in the s. 32 of the Act and that the appellants only have to fulfill the test ie, that the property was legally acquired and that there was no offence committed. He further contended that there is no mention of presumption under s. 32 of the Act. Thus, he submitted that had the High Court accepted both the appellants' versions that the monies were acquired by them through the internet football betting and friendly loan activities, the properties should rightly therefore be returned to the appellants.

**[12]** The learned deputy public prosecutor submitted otherwise. He submitted that the test adopted by both the trial judge and the High Court judge was the correct approach. He submitted that the wording in s. 35 is so plain and obvious that it covers any proceeding under the Act and therefore the presumption of illegal property under s. 35 is applicable to s. 32 of the Act.

## Decision

**[13]** Before going any further, it is necessary to examine both s. 32 and s. 35 of the Act, which we now reproduce:

> 32. Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto.
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> (1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and -
>
> (a) no prosecution for any offence under any law is instituted with regard to such property;
>
> (b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and
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> (c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.
>
> (2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.
>
> (3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the

Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

35. Presumption as to liable person and illegal property.

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

**[14]** The working of s. 32 of the Act is well illustrated by Shaikh Daud JCA (as he then was) speaking for the Court of Appeal in *PP v. Tan Lee Kok* [1998] 2 CLJ 286, which reads as follows:

... As for s. 32 of the Act, it applies to any property seized, such as under s. 25 of the Act. The seizure in the present case is under s. 25 of the Act. Having seized such properties, and if no prosecution is instituted (s. 32(1)(a)) or if no proceedings commenced by the Public Prosecutor, such as under s. 8 (s. 32(1)(b)) and no claim is made by anyone within a period of three months, (s. 32(1)(c)) then the seized property or properties stands forfeited after the expiration of the said three months.

If within the three months from the date of the seizure, a claim in writing is made by anyone as in the case in the present appeal, the Public Prosecutor is required within fourteen days after the expiry of the three months, to refer such claim to the Sessions

> Court for its decision (s. 32(2)). Unlike the provisions under s. 8, no application need be made by anyone in the Sessions Court, nor is the Sessions Court required to be satisfied that any provisions has been complied with except perhaps that the claim is made in writing within three months from the date of the seizure. Upon being referred to under s. 32(2), then pursuant to s. 32(3), the Sessions Court is required to issue a summons to the person claiming and shall proceed to the examination of the matter. From this it can be seen that the law does not place the burden on the Public Prosecutor to satisfy the court that the seizure was proper, or that the property ought to be forfeited, on the contrary the law places a burden on the person who made the claim to answer the summons.
>
> Section 32(3) places the burden upon the person making the claim "upon proof that he is lawfully entitled thereto." Section 32, therefore, places no burden on the Public Prosecutor to proof anything. It merely places the burden to refer the claim to the Sessions Court. Therefore, under s. 32, the role of the Public Prosecutor is merely to forward the claim and as has been well put by the Deputy Public Prosecutor, the role of the Public Prosecutor is that of a "forwarding agent". In fact, the procedure both in s. 8 and in s. 32 is consistent with s. 101 of the Evidence Act 1950, which provides that the burden of proof is on the person who asserts a thing. Under s. 8 since it is the Public Prosecutor who asserts that the property ought to be forfeited, the burden is therefore, on him, whereas under s. 32 the burden would be on the claimant who asserts that he is lawfully entitled to the property.

**[15]** We share the same view as to the interpretation of s. 32. Clearly s. 32(3) by itself places the burden upon the person making the claim to prove that he is lawfully entitled to the property. However, the issue posed to us is not on the working of s. 32 of the Act but whether "the presumption as to liable person and illegal property" under s. 35 of the Act is applicable to a proceeding under s. 32 of the Act.

**[16]** At the High Court level, there have been a number of cases which held that s. 35 of the Act is applicable to proceeding under s. 32 of the Act. Nik Hashim J (as he then was) in *Public Finance Bhd v. PP* [1999] 8 CLJ 485 had observed:

> Section 35 is clear in its provisions. Thus, with respect, I do not agree with counsel's contention that the presumption is not applicable to the appellant. Besides Azlin, the appellant was also a person 'proceeded against' in the claim proceeding, for the

A proceeding under s. 32(3) is a proceeding within the meaning of 'any proceedings' in respect of any illegal property under s. 35 of the Act. Thus in this case, the presumption is equally applicable to the appellant.

B **[17]** In *Kii Sie Hoong v. PP* [2008] 1 CLJ 683 Sangau Gunting J, speaking on the same subject said:

It must be pointed out as rather blurry the issue of whether "the presumption of liable persons" is applicable or otherwise to a proceeding under s. 32 of Part IV in view of the definition of a C "liable person" being confined to proceedings under Part III only. But that would perhaps be delving into "ambiguities ... infirmities of language ... other defects or deficiencies ..." in the provisions of the Act, which by virtue of s. 34 of the same Act should be disregarded so that any construction and interpretation thereof would "give effect to the purposes of this Act ...

D **[18]** In *PP v. Jessie Tan Poh Yoke* [2008] MLJU 910 Apandi Ali J (as he then was) in dealing with the same subject said:

The proceedings undertaken by the Sessions Court under Section E 32(3) of the Act, is governed by special provisions in respect of evidence and procedure, namely under part VI of the Act. One of the special provision is the provision in respect of the presumption as to "liable person" and "illegal property" under section 35 of the Act.

F Applying to presumption under Section 35 which is to be read together with section 32(3) of the Act, it is clear that the onus or burden of proof lies with the claimant. In other words the law shifted the burden upon the claimant.

**[19]** In *PP v. Lee Kee Seng & Satu Lagi* [2005] 3 CLJ 649, G Zabidin J also dealing on the same subject had this to say:

Seksyen 35 Akta dengan jelas memperuntukkan;

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such H person is a liable person or such property is illegal property, the court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the public prosecutor shall have the right to rebut the same. I

> Dengan lain perkataan Hakim Mahkamah Sesyen perlu memulakan kes ini dengan menganggap bahawa Lee Kah Seng dan Loh Kah Hock sebagai liable person dan kereta PDR 2837 sebagai illegal property. Terpulang kepada pemohon/responden untuk membuktikan sebaliknya. Jika ini gagal dilakukan maka Hakim Mahkamah Sesyen mempunyai tanggungjawab untuk memerintahkan kenderaan tersebut dilucut hak kepada Kerajaan Malaysia.

**[20]** The only case in the High Court that had ruled that s. 35 is inapplicable to a proceeding under s. 32(3) is *Hong Leong Bank Bhd v. PP* [2009] 8 CLJ 463. In that case, Lim Yee Lan J held that s. 35 did not apply to a proceeding under s. 32 of the Act. She gave her reasons as follows:

> A literal reading of s. 35 shows that it is intended to apply to a proceeding which is brought under this Act against any person or in respect of any property on the ground that such person is a liable person or such property is illegal property, which, based on the foregoing discussions, can only refer to a proceeding under Part III of the Act and not otherwise. In other words, the presumption under s. 35 would apply to the hirer had proceedings under Part III of the Act been taken against him by the PP on the basis of him being a liable person and the said vehicle an illegal property.
>
> It is also my view that had s. 35 been intended to apply to all proceedings, including a claim made under s. 32(1), under the Act, it would have used words to such effect as "In all proceedings under this Act" minus those qualifying words in italics.
>
> My view is also fortified by the heading in s. 32 of the Act which states that it applies to "forfeiture of property seized under the Act where there is no prosecution, or no proceedings under Part III or no claim thereto".
>
> Thus, while an inquiry under s. 32 is a proceeding under the Act, it is however not a proceeding brought by the PP against any person on the ground that he is a liable person or on the ground that the property is illegal property.
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> Consequently, a proceeding under s. 32(3) of the Act is not a proceeding that is envisaged under s. 35 of the Act and hence the presumptions therein that the court shall presume a person to be a liable person and a property to be an illegal property does not apply to a proceeding under s. 32 of the Act. It is to be

A emphasized that the Court of Appeal in *Public Prosecutor v. Tan Lee Kok* did not touch at all on the relationship between s. 32 and s. 35 of the Act, its focus being more on the difference in the procedures between ss. 8 and 32 proceeding under the Act.

B **[21]** With respect, we are more inclined to agree with the majority of the High Court judges which have held that the presumption under s. 35 of the Act is applicable to a proceeding under s. 32 of the Act. We share the view that s. 35 was intended to apply to all proceedings under the Act. The wordings in s. 35 are very clear. It uses the words "any proceeding". The C words "any proceedings" should and must be given the ordinary meaning that it covers all proceedings under the Act. To say that a proceeding under s. 32(3) of the Act is not a proceeding that is envisaged under s. 35 of the Act and would not be in tendem with the intention of law makers and would be in violation to the D clear wordings of s. 35 of the Act.

**[22]** Thus in the instance case, the appellants are claiming for the return of the properties seized by the police pursuant to s. 25(1) of the Act. Section 35 of the Act places upon the appellants to E prove by admissible evidence that the properties are not illegal properties. It places no burden on the public prosecutor to prove anything. The burden has shifted to the appellants. And on the facts of this case, the appellant had failed to prove that the properties are not illegal properties. It was their contention that F the properties were acquired through internet football betting and friendly loan activities. But both the Sessions Court and the High Court found such claims were not supported by evidence. We have perused through the records and we have found that there is no credible evidence to back the appellant's claim. Thus, we G have no reason to differ from the findings of the courts below. The presumption thus remains unrebutted and the properties are presumed to be illegal and therefore it has been rightly forfeited to the Government of Malaysia.

H **[23]** The provisions under s. 35 may be harsh or unjust. In this respect, we only need to quote the wise words of Raja Azlan Shah FCJ (as his Royal Highness then was) speaking on the "harsh and unjust law" in the case of *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90:

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The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107, 118:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.
>
> It is the province of the courts to expound the law and "the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction" - per Roskill LJ in *Henry v. Geopresco International Ltd.* [1975] 2 All ER 702, 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature and not the courts; they have their remedy at the ballot box.

**[24]** Accordingly, the appeal is dismissed. We affirm the orders made by the High Court.